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No. 03-1338

IN THE

Supreme Court of the United States

SANTA BARBARA NEWS-PRESS, ET AL.,

Petitioners,

—v.—

LEONARD M. ROSS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE CALIFORNIA COURT OF APPEAL, SECOND DISTRICT

MOTION FOR LEAVE TO FILE AND BRIEF AMICI CURIAE OF MEDIA ENTITIES IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE AMICUS BRIEF

Proposed *amici curiae* hereby file their combined Motion for Leave to File and Brief Amici Curiae of Media Entities in Support of the Petition for a Writ of Certiorari. S. Ct. R. 37.2(b). Petitioners have consented to the filing of this amicus brief, and a letter of such consent is being filed concurrently herewith. Respondent has failed to return phone calls seeking consent; thus, consent has not been obtained from respondent.

Proposed *amici* are national media organizations involved in the gathering and reporting of news to the American public. The media entities who seek permission to submit this brief include publishers of newspapers from around the country ranging from *The Wall Street Journal*, *The Washington Post* and *USA Today* to the *San Diego Union-Tribune*, the *Providence Journal*, and the *Atlanta Journal-Constitution*; magazines of wide circulation, such as *Time*, *Newsweek*, *The New Yorker*, *Good Housekeeping*, *Town and Country*, and *Business-Week*; and national broadcast news networks, including ABC, Inc., CBS Broadcasting Inc., and National Broadcasting Company, Inc.; and Bloomberg News, which publishes news in a variety of media.

Proposed *amici* are vitally interested in ensuring that the substantive and procedural protections afforded by the First Amendment to the U.S. Constitution are vigorously and uniformly applied throughout the country. The present petition for certiorari highlights two critical areas of libel law as to which there are substantial inconsistencies in judicial treatment, inconsistencies well deserving of this Court's attention: (i) the failure of many lower appellate courts to engage in constitutionally mandated independent review regarding the issue of whether a plaintiff has shouldered his or her burden of

proving falsity; and (ii) the failure of many lower courts to treat individuals as limited purpose public figures who own, or seek to own, a controlling stake in a regulated industry such as the savings and loan industry in the instant case. Because there was a failure of these fundamental protections in this case, the *Santa Barbara News-Press* was forced to litigate this case for over a decade and now faces a multi-million-dollar libel judgment for the publication of two newspaper articles of undisputed public import to the local community. Proposed *amici* have a profound interest in this case because they, like petitioners, publish or broadcast news articles and editorials about prominent business leaders who purchase, or seek to purchase, controlling interests in regulated industries. Proposed *amici* depend upon independent appellate review and the public-figure doctrine in preparing news reports and editorials about such people without the fear of chilling libel suits.

For the foregoing reasons, proposed *amici* respectfully request this Court to grant the motion for leave to file their amicus brief in support of the petition, which is attached hereto.

Dated: New York, New York
April 22, 2004

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are national media organizations involved in the gathering and reporting of news to the American public.[1] The media entities that submit this brief include publishers of newspapers from around the country ranging from *The Wall Street Journal*, *The Washington Post* and *USA Today* to the *San Diego Union-Tribune*, the *Providence Journal*, and the *Atlanta Journal-Constitution*; magazines of wide circulation, such as *Time*, *Newsweek*, *The New Yorker*, *Good Housekeeping*, *Town and Country*, and *BusinessWeek*; and national broadcast news networks, including ABC, Inc., CBS Broadcasting Inc., and National Broadcasting Company, Inc.; and Bloomberg News, which publishes news in variety of media. A complete listing and description of *amici* is set forth in the appendix to this brief.

. *Amici* are vitally interested in ensuring that the substantive and procedural protections afforded by the First Amendment to the U.S. Constitution are vigorously and uniformly applied throughout the country. The present petition for certiorari highlights two critical areas of libel law as to which there are substantial inconsistencies in judicial treatment, inconsistencies well deserving of this Court's attention: (i) the failure of many lower appellate courts to engage in constitutionally mandated independent review regarding the issue of whether a plaintiff has shouldered his or her burden of proving falsity; and (ii) the failure of many lower courts to treat

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[1] No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than *amici curiae* made any monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6. The petitioners have consented to the filing of this brief and their letter has been filed with the Clerk of Court; the respondent has not consented. Thus, *amici* submit this brief accompanied by their motion for leave to file same. Sup. Ct. R. 37.2(b).

individuals as limited purpose public figures who own, or seek to own, a controlling stake in a regulated industry such as the savings and loan industry in the instant case. Because there was a failure of these fundamental protections in this case, the *Santa Barbara News-Press* was forced to litigate this case for over a decade and now faces a multi-million-dollar libel judgment for the publication of two newspaper articles of undisputed public import to the local community. *Amici* have a profound interest in this case because they, like petitioners, publish or broadcast news articles and editorials about prominent business leaders who purchase, or seek to purchase, controlling interests in regulated industries. *Amici* depend upon independent appellate review and the public-figure doctrine in preparing news reports and editorials about such people without the fear of chilling libel suits.

INTRODUCTION

The *Santa Barbara News-Press*, in publishing its profile of businessman Leonard Ross, did what *amici* do countless times a week. It identified an important news story of public significance—the background of a prominent business leader who had filed an application with state and federal regulators to increase his ownership to a controlling percentage in a local troubled savings and loan institution—and it assigned a journalist to research and write a profile on the would-be purchaser. This was the late 1980s at the height of the savings and loan crisis that shook this country, a foreshadowing of recent corporate scandals involving companies like Enron that have become all to common. The journalist assigned to the story, Kathleen Sharp, researched her subject seriously and thoroughly. According to the lower court's opinion, she examined Mr. Ross's background for more than three

months; reviewed hundreds of pages of court records pertaining to many lawsuits in which Mr. Ross was involved, as well as an FBI report and grand jury transcripts into a criminal investigation of Mr. Ross; and interviewed approximately 100 people including Mr. Ross. Petn. at 6a.[2] After the publication of her first article, Mr. Ross withdrew his application to increase his ownership in the savings and loan institution. *Id.* at 7a. He then brought a libel action against the newspaper and its reporters for the original article as well as a follow-up article that reported the withdrawal of his application.

There is no dispute that the articles concerned matters of public importance. There is also no dispute that the articles at issue, which together consisted of 120 paragraphs and a sidebar chronology of events, were largely true. Mr. Ross challenged only three statements in the lengthy articles and a supposed implication from them—all related to whether it was true that Mr. Ross was "investigated" for the same investor frauds that sent his former business partner to prison.

This case highlights the importance of two safeguards that *amici* depend upon every day in ensuring that articles of public interest get written. The first is the doctrine of independent appellate review. Here, the lower appellate court refused to engage in such an independent review of the record to determine whether plaintiff had carried his burden of proving falsity. Had the court done so, it would likely have been obliged to conclude that plaintiff had not discharged this burden, in the face of testimony from an SEC lawyer that plaintiff was in fact "looked at" as part of the 1976 investigation into his former business partner. Petn. at 22a; *see also id.* at 6-7. The second protection is that afforded by the public fig-

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[2] Citations to the lower court's opinion are to the petition.

ure doctrine itself. Had Mr. Ross been held to be a limited purpose public figure, as *amici* believe he should have been with respect to an article about his prior business dealings bearing upon his application to gain a controlling interest in a savings and loan institution, the case would have been governed by the actual malice standard rather than mere negligence. Because the court found that there was no actual malice, the defamation claim would have been dismissed. This case, arising in an area of continuing disagreement among lower courts around the nation, thus highlights the dangers posed to First Amendment interests by the failure of courts to apply both independent appellate review and the public figure doctrine correctly and consistently.

SUMMARY OF ARGUMENT

This Court should squarely address the issues of whether the doctrine of independent appellate review applies to a finding of falsity and whether an individual who owns, or seeks to own, a controlling interest in a regulated industry is, at a minimum, a limited purpose public figure with respect to the person's prior business dealings. Both issues have led, as we set forth below, to stark inconsistency in lower court rulings. Both issues, as well, have led to inconsistent rulings in cases involving the *amici* themselves. *Compare Veilleux v. National Broadcasting Co.*, 206 F.3d 92 (1st Cir. 2000) *with Lundell Mfrg. Co. v. American Broadcasting Cos.*, 98 F.3d 351 (8th Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997) (disagreeing about requirement of independent appellate review of truth/falsity issue); *Silvester v. American Broadcasting Cos.*, 839 F.2d 1491 (11th Cir. 1988) *with Sisler v. Gannett Co.*, 516 A.2d 1083 (N.J. 1986) (disagreeing about whether individuals with substantial interests in regulated industries should be deemed lim-

ited purpose public figures under the First Amendment). Based on their own experiences, as well as that reflected in the entirety of the case law, the *amici* urge this Court to grant the writ.

ARGUMENT

I. THIS COURT SHOULD DETERMINE THAT APPELLATE COURTS MUST ENGAGE IN AN INDEPENDENT REVIEW OF A FINDING OF FALSITY

A. The Lower Court's Decision Is at Odds with This Court's Precedent

The California Court of Appeal refused to review the jury's finding of falsity independently, and instead reviewed the jury's finding under a deferential standard. Petn. at 20a-21a. This ruling was erroneous. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court engaged in an independent review of the record and held that the facts there did not amount to the constitutionally required "actual malice" so as to support a libel judgment. In so ruling, this Court observed that when examining the line between constitutionally protected speech and unprotected speech, "[w]e must make an independent examination of the whole record so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times*, 376 U.S. at 285 (internal quotation and citation omitted). Twenty years later, in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), this Court reaffirmed the principle of independent appellate review of "actual malice" findings. *Accord Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989) (independent appellate review of actual malice).

Independent appellate review of issues beyond actual malice has been undertaken by this Court in defamation cases. In *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970), this Court reviewed a libel judgment that had been affirmed by the Maryland Court of Appeals involving comments made about a real estate developer's plans at a city council meeting regarding zoning issues. The debate at the meeting was heated and a local reporter, who covered the meeting, truthfully recounted in a newspaper article that some participants referred to the developer's plan as "blackmail." In reversing the libel judgment, this Court engaged in an independent review of the use of the word "blackmail" in the context of the meeting and the article. *Id.* at 13-14. This was not a review of actual malice; rather, it was of the take-away message of the average reader of the word "blackmail." This Court concluded that

> "[i]t is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant: it was [the real estate developer's] public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers or the newspaper articles reporting their words were charging [the real estate developer] with the commission of a criminal offense." *Id.* at 14.

Greenbelt demonstrates that this Court has not confined independent appellate review in the libel context to issues of actual malice.

Indeed, in *Bose* and in many later cases, the Court has made plain that independent appellate review is required in *all* cases raising First Amendment interests, not just libel law. *See Bose*, 466 U.S. at 504-08 (citing many examples, such as determinations of whether speech

amounts to unprotected "fighting words" or "incitement to riot" or "obscenity"); *Connaughton*, 491 U.S. at 685 n.33 (same); *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group*, 515 U.S. 557, 567 (1995) (whether parade was expressive activity entitled to First Amendment protection). In *Hurley*, this Court's most recent treatment of the issue, the Court (quoting from *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927)) observed that the First Amendment-compelled requirement of independent appellate review "generally requires us to 'review the finding of facts by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.' " *Id.* at 567. Thus, in areas infused with a mixture of factual and legal questions, appellate courts routinely engage in independent appellate review to ensure that First Amendment-protected activity is fully protected.

This Court's decision in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), makes clear that the element of falsity is a constitutional requirement. *Hepps* holds that the plaintiff in a libel case involving a matter of public concern bears the burden of proving that the statement at issue is false. Later, in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), this Court embraced the doctrine of "substantial truth," making plain that a libel plaintiff may not prove falsity by showing minor inaccuracies if, had the literal truth been published, the same effect or "gist" would have resulted from the publication anyway. *Masson*, 501 U.S. at 517.

The question of truth vis-à-vis falsity is thus a dividing line between protected and unprotected speech. A true statement or, as set forth in *Masson*, a substantially true one, no matter how defamatory, cannot constitute libel. Yet, as *amici* can attest from their own experience,

questions of substantial truth are ones that are frequently fraught with imprecision, certainly as much as whether a libel defendant has published an article with actual knowledge of falsity, one of the two possible prongs of the actual malice determination.

B. Lower Courts Are Hopelessly Divided on the Issue of Whether an Independent Appellate Review of Falsity Is Constitutionally Required

The certiorari petition sets forth a split among federal appellate courts and state courts of last resort on the issue of whether appellate courts are required to engage in an independent review of the truth/falsity issue. Petn. at 8-12. The split is deep and well-developed. The division in authority will not benefit from additional views from lower courts; the split is ripe for this Court's guidance. *See* Sup. Ct. R. 10.

The gravity of the split can be demonstrated by comparing two cases that have been decided by federal appellate courts involving two of the *amici*: *Veilleux v. National Broadcasting Co.*, 206 F.3d 92 (1st Cir. 2000) (independent review of truth/falsity required) and *Lundell Mfrg. Co. v. American Broadcasting Cos.*, 98 F.3d 351 (8th Cir. 1996) (independent review of truth/falsity not required). *Veilleux* involved a challenge surrounding a broadcast that aired on "Dateline NBC" regarding the dangers to the public posed by tired long-distance truck drivers. The plaintiffs, including a truck driver who was profiled in the piece and his boss, brought a lawsuit claiming, among other things, that the broadcast defamed them. The broadcast generally painted an unflattering picture of plaintiffs, including statements that the truck driver had altered log books and had violated regulatory requirements. The plaintiffs challenged eighteen specific passages in the broadcast. The jury

held that thirteen of the passages were false, and awarded damages on the libel claims. The district court denied NBC's post-trial motions, ruling that the evidence must be viewed in the light most favorable to plaintiffs.

The First Circuit reversed the libel judgments. *Veilleux*, 206 F.3d at 105, 107-19. Key to the court's decision was the standard of review. On this, the appellate court was clear: "[d]eference to the jury is muted . . . when free speech is implicated." *Id.* at 106. Thus the Court explained that it would engage in independent review of the jury's determinations "that specifically involve the application of First Amendment law to specific facts." *Id.* at 107. Citing *Hepps*, the First Circuit stated that it was plaintiffs' burden to prove the falsity of each statement "and our duty, on appeal, to independently verify that this burden was met." *Id.* at 108.

The First Circuit thereupon engaged in a thorough review of all thirteen statements at issue. As to each, the same essential conclusion was reached: plaintiffs had failed to prove that the challenged statements were materially false. *Id.* at 105, 111, 113-19. The First Circuit would not have—indeed could not have—reached the same conclusion under a more deferential standard of reviewing the jury's findings.

In stark contrast, a far more deferential approach was adopted by the Eighth Circuit in *Lundell Mfrg. Co. v. American Broadcasting Cos.*, 98 F.3d 351 (8th Cir. 1996). *Lundell* involved a challenge to a news story broadcast on "World News Tonight with Peter Jennings" as part of a continuing series entitled "Anger in America." The particular report focused on a garbage recycling machine, produced by plaintiff Lundell and purchased by taxpayers in rural Berrien County, Georgia. At issue was the use of the phrase "does not work" in the broadcast. Plaintiff Lundell filed a defamation claim

alleging that the "does not work" language falsely stated that the garbage recycling machine was inoperable. ABC agreed that the machine functioned properly, but pointed to the entire context of the report in arguing that the average viewer would understand the broadcast to mean that the recycling machine did not work as it was intended to—because it was too expensive to run. The jury found for plaintiff, and the district court granted ABC's post-trial motion, ruling that the news report was substantially true as a matter of law. *Id.* at 355.

The Eighth Circuit reversed and reinstated the jury's libel verdict. In its opinion, the court noted that the proper standard of appellate review had been hotly contested by the litigants. After reviewing this Court's precedents, the court concluded that "the First Amendment commands in a defamation case brought by a private plaintiff against a media defendant only that we review the record to determine whether a reasonable trier of fact could find that the statement could be interpreted as a false assertion of fact. In essence, these cases support a sufficiency of the evidence analysis." *Id.* at 359. This conclusion, of course, is in stark contrast to the First Circuit's decision in *Veilleux* that appellate courts must "independently verify" whether plaintiffs' have carried their burden on falsity. *Compare Veilleux*, 206 F.3d at 108. This Court should grant certiorari to bring harmony to this significant area of defamation law.

II. THIS COURT SHOULD CLARIFY THAT A PERSON WHO OWNS OR SEEKS TO OWN A CONTROLLING INTEREST IN A REGULATED INDUSTRY IS A PUBLIC FIGURE FOR PURPOSES OF ARTICLES ABOUT THAT PERSON'S BUSINESS DEALINGS

As this Court has recognized, the status of a libel plaintiff is one of the most important threshold questions in any libel case. *Hepps*, 475 U.S. at 775. In the underlying case, the classification of Mr. Ross as a private figure permitted the libel claim to go to the jury on the issue of negligence. If Mr. Ross had been classified as a public figure, as he should have, his defamation claims would have been dismissed because the trial court directed a verdict in petitioners' favor finding that no reasonable juror could find actual malice, a finding that was affirmed on appeal. Petn. at 34a. Like many cases involving the *amici*, the classification of the plaintiff as a public or a private figure was case-determinative.

As the certiorari petition demonstrates (Petn. at 17-21), lower courts throughout the country have reached inconsistent results regarding the status of a particular plaintiff in similar factual circumstances such as leadership in a regulated industry. As one often-quoted opinion put it, the process of determining who is and who isn't a public figure is akin to "trying to nail a jellyfish to the wall." *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978). While it may be tempting to seek to explain the different outcomes on the public figure question on the basis of differing facts, a closer inspection reveals the inadequacy of any such explanation. Just as this Court has reviewed actual malice determinations to assure that *that* doctrine is given meaning through case-by-case adjudication, so too should this Court review

this case presenting important "public vs. private" figure distinctions.

Again, the conflict in the lower courts can be illustrated by contrasting two cases involving *amici* entities before this Court: *Sisler v. Gannett Co.*, 516 A.2d 1083 (N.J. 1986) (holding that for purposes of federal constitutional analysis, former bank president not a public figure for purposes of article about improper loans made by bank) and *Silvester v. American Broadcasting Cos.*, 839 F.2d 1491 (11th Cir. 1988) (holding that individual plaintiff, who was the principal stockholder in companies involved in the jai alai industry, was a public figure for purposes of article about that industry). In *Sisler*, the local newspaper ran a three-part series concerning alleged improper loans made by the Franklin State Bank. One of the articles stated that plaintiff, the former bank founder and president, had received uncollateralized loans from the bank for other business purposes. The plaintiff brought a libel action. The trial court held that plaintiff was a private person and the jury returned a verdict for plaintiff, which was affirmed by the state appellate court.

The New Jersey Supreme Court, on the federal constitutional issue, affirmed that the plaintiff was a private figure. In so ruling, the court cited to the three leading cases from this Court on the subject: *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); and *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979). *Sisler*, 516 A.2d at 1090. The *Sisler* court narrowly, and we believe incorrectly, read these decisions and found that they supported the finding that the plaintiff was not a public figure. Citing *Gertz*, the court emphasized that the plaintiff had not "thrust [himself] to the forefront of particular public controversies in order to influence the

resolution of the issues involved." *Id.* Again, the court noted as persuasive that the plaintiff did not consciously seek attention on the particular public controversy, and in fact had shunned publicity generally since his retirement. *Id.*

In direct contrast is the Eleventh Circuit's decision in *Silvester*. There, ABC broadcast on its "20/20" program a report on allegations of corruption in the American jai alai industry. In particular, the program averted to allegations of illegal conspiracies regarding betting systems, as well as allegations of arson and fraud related to a gaming site. Like the banking industry at issue in *Sisler* and *Ross*, the jai alai industry is heavily regulated and infused with matters of concern to the public. The district court held that the individual plaintiff (and his corporations) was a public figure. Finding no clear and convincing evidence of actual malice, the court entered judgment for defendants.

The Eleventh Circuit affirmed the dismissal. In agreeing that the plaintiff was properly classified as a public figure, the court explained as follows:

> "Because the plaintiffs held positions of prominence in an industry with a very limited number of major figures, they were in a position to influence the resolution of the controversy over corruption in the jai alai industry. Plaintiffs initially thrust themselves into this position of prominence by voluntarily entering a strictly regulated, high-profile industry in which there were few major participants. By becoming important members of the regulated jai alai industry, they invited public scrutiny, discussions, and criticism."

Silvester, 839 F.2d at 1497. The reasoning of the Eleventh Circuit, which we believe to be the correct

approach, conflicts with that employed in *Sisler* and in the *Ross* decision below.

Amici respectfully urge the Court to grant the petition to harmonize the disagreement that exists in the lower courts in their approaches to the public figure/regulated industry intersection. *Amici*, like petitioners here, often report on business leaders such as Mr. Ross who either own or seek to own controlling interests in regulated industries such as banking, securities, and healthcare. Such industries are of obvious public concern, warranting particular scrutiny from the press and the public. News reports such as that reporting on Mr. Ross's past business dealings should be encouraged, especially when the same individual seeks to gain a controlling ownership interest in a regulated industry that could greatly affect the public. Such articles are clearly of the sort that require the "breathing space" articulated in *New York Times v. Sullivan*, 376 U.S. at 271-72.

Moreover, one who inserts himself into a position of prominence and control within a regulated industry thereby "voluntarily injects himself . . . into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Gertz*, 418 U.S. at 351. Such an individual necessarily invites scrutiny from the public and the press by the voluntary decision to play a prominent role in a public, regulated field. It should not be the case that individuals who have done so can escape limited purpose public figure status by simply stating that they did not want the scrutiny, or by pointing to the absence of a pre-existing "controversy." The "controversy" requirement has been read far too narrowly on the *Ross* and *Sisler* side of the split. Given the high degree of public interest and undeniable public importance of pervasively regulated industries, it should be enough to trigger public figure status that a person

has voluntarily assumed, or is seeking to assume, a position of control within such a business. The press should not be left to guess whether it will get the benefit of the public figure doctrine and the actual malice standard when reporting on such matters of obvious public interest.

By their nature, *amici* submit, pervasively regulated industries should be subject to the closest scrutiny, regardless of whether a specific controversy has surfaced. The savings and loan crisis of the late 1980s provided the background of the *Santa Barbara News-Press*'s investigative piece on Mr. Ross. Unfortunately, the nation has recently endured still more corporate scandals. *See, e.g.*, R. Smith and J. Emshwiller, *Running on Empty: Enron Faces Collapse as Credit, Stock Dive and Dynergy Bolts*, The Wall Street Journal, Nov. 29, 2001, at A1; D. Hilzenrath, *After Enron, New Doubts About Auditors*, The Washington Post, Dec. 5, 2001 at A1; S. Romero, *Turmoil at WorldCom: The Overview; WorldCom Facing Charges of Fraud; Inquiries Expand*, The New York Times, Jun. 27, 2002, at A1; J. Sandberg, D. Solomon, R. Blumstein, *Disconnected: Inside WorldCom's Unearthing of a Vast Accounting Scandal*, The Wall Street Journal, Jun. 27, 2002, at A1; J. Glater, *Freddie Mac Understated Its Earnings by $5 Billion*, The New York Times, Nov. 22, 2003, at C1. In the wake of such scandals, surely the press should be encouraged to play an active role in scrutinizing regulated industries and bringing to light the information that it learns. *See, e.g., Trotter v. Jack Anderson Enterprises, Inc.*, 818 F.2d 431, 434 (5th Cir. 1987) ("[t]he purpose of investigative reporting is to uncover matters of public concern previously hidden from the public view"); *Sisler*, 516 A.2d at 1093 (noting that press is expected and should be encouraged to report on matters of public concern).

Amici believe that the proper reading of this Court's public figure jurisprudence was set forth cogently in the *Sisler* decision in its ruling, albeit only on state law grounds. After determining that plaintiff was not a public figure for federal constitutional purposes (a ruling *amici* believe was erroneous), the New Jersey Supreme Court reached the opposite conclusion on the basis of state law. As the court reasoned:

> "[I]n contradistinction from the federal view, we do not deem it unfair to favor free speech over the reputational interests of an individual who has voluntarily and knowingly engaged in conduct that one in his position should reasonably know would implicate a legitimate public interest, engendering the real possibility of public attention and scrutiny. While such an individual has not sought publicity, by willingly and knowingly engaging in conduct that exposes him to the risk of attention, he has relinquished part of his reputation to the public eye. . . . In light of our stronger concern for speech on public matters, such an individual is not unfairly burdened with a higher standard for actionable defamation."

Sisler, 516 A.2d 1092-93 (internal citation omitted). The court noted that the plaintiff there, by serving as president and director of the bank and becoming "conversant with all the public and governmental interests that attend the banking industry" "voluntarily, and presumably knowingly, risked exposure on a subject-matter of legitimate public concern." *Id.* at 1093. The court went on to hold that the actual malice standard, therefore, should apply.

Amici believe that this rationale offered by the *Sisler* court is compelling, but that the very inconsistency in the case law that prompted the filing of the petition in

this case misled the New Jersey court to misapprehend the correct nature of federal law. It has been twenty-five years since the Court last addressed the public figure/private figure distinction. *Hutchinson, supra; Wolston, supra.* Since that time, a large body of law has developed in the lower courts that is utterly inconsistent. Since that time, regulated industries have taken on an even greater prominence in our society. The current case presents an appropriate vehicle for bringing order to at least one critical area of the public figure doctrine and establishing a workable rule: namely that individuals who own, or seek to own, a controlling interest in a regulated industry should be treated as limited purpose public figures as respects news reports about their business dealings.

CONCLUSION

For the reasons set forth above and in the petition, this Court should grant the petition for a writ of certiorari.

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APPENDIX

LISTING OF AMICI CURIAE

Advance Publications, Inc. is a communications company that, directly or through subsidiaries, publishes daily newspapers in over 25 cities and weekly business journals in over 40 cities throughout the United States. It also owns The Conde Nast Publications Inc., which publishes eighteen magazines with nationwide circulation, including *The New Yorker*, *Vanity Fair* and *Vogue*, and also owns Fairchild Publications, Inc., Parade Publications, and The Golf Digest Companies. In addition, it owns many Internet sites that are related to its print publications, as well as interests in cable systems serving over 2 million subscribers.

ABC, Inc. is a broad-based communications company with significant holdings in the United States and abroad. It owns, alone or through its subsidiaries, the ABC Television Network, the ABC Radio Network, ten television stations, and fifty-two radio stations.

Belo Corp. is a diverse media company that publishes leading newspapers around the country, including *The Providence Journal* and *The Dallas Morning News*, with a combined circulation of 900,000 daily and 1.2 million on Sunday; owns nineteen television stations reaching 13.8 percent of U.S. television households; and operates many news and information Web sites on the Internet.

Bloomberg News operates a 24-hour global news service that supplies business, financial and legal news to more than 200,000 subscribers world-wide though the Bloomberg Professional Service, an electronic real-time desktop delivery system. Bloomberg also operates as a wire service, serving more than 350 newspapers and magazines world-wide. Bloomberg also maintains eleven 24-hour cable television news channels around the

world, and WBBR, an all-business news radio station in New York City. Bloomberg also produces and distributes daily radio programming throughout the world through its 750 radio affiliates. Bloomberg also publishes two monthly magazines, and its Bloomberg Press division publishes more than 50 titles each year.

CBS Broadcasting Inc. produces and broadcasts news, public affairs, and entertainment programming. CBS News produces morning, evening, and weekend news programmings, as well as news and public affairs magazine shows, such as 60 MINUTES and 48 HOURS. CBS also owns and operates television stations nationwide and, through a related company, Infinity Broadcasting Corporation, owns and operates radio stations throughout the country.

The Copley Press, Inc. publishes *The San Diego Union-Tribune* and eight other daily newspapers in California, Illinois, and Ohio, and operates Copley News Service, an international news service.

Cox Enterprises Inc. publishes the *Atlanta Journal-Constitution* and owns Cox Newspapers, Inc., publisher of 16 other daily and 23 non-daily newspapers. It is also has a controlling interest in Cox Broadcasting, Inc., which owns 15 radio stations; Cox Radio, Inc., which owns or operates 78 radio stations; and Cox Communications, Inc., which provides broadband television programming, high speed internet access and telephony to over 6 million customers nationwide.

Dow Jones & Company, Inc. publishes *The Wall Street Journal*, a daily newspaper with a national circulation of over 2 million each business day, WSJ.com, a news website with approximately 700,000 paid subscribers, Dow Jones Newswires, a collection of real-time

electronic news services, *Barron's*, a weekly business and finance magazine, and, through its Ottaway Newspapers subsidiary, community newspapers.

Gannett Co., Inc. is an international news and information company that publishes 101 daily newspapers in the United States with a combined daily paid circulation of 7.6 million, including USA TODAY, which has a circulation of 2.2 million. Gannett publishes a variety of non-daily publications, including USA WEEKEND, a weekly newspaper magazine with a circulation of 23.7 million. The company also operates more than 125 web sites in the United States and a national news service. Gannett's twenty-two television stations cover 17.8 percent of the United States.

The Hearst Corporation publishes newspapers, consumer magazines, and business publications, owns a leading features syndicate, has interests in several cable television networks, and produces movies and other programming for television.

The McGraw-Hill Companies, Inc. is a multimedia publishing and information company which publishes books and magazines, including *BusinessWeek*, and also operates four local television stations.

National Broadcasting Company, Inc. operates a national television network of more than 200 affiliates and several owned-and-operated stations, through which it produces and broadcasts local and national news programming, such as DATELINE NBC. It also owns two national cable news networks, MSNBC and CNBC.

Newsweek, Inc. is a subsidiary of The Washington Post Company, publishes the weekly news magazine *Newsweek* and *Newsweek International*, which are distributed nationally and internationally, and *Arthur From-*

mer's Budget Travel Magazine, which is distributed nationally.

Time Inc. is the largest publisher of general interest consumer magazines in the world, publishing over 130 magazines in the United States and abroad. Its major titles include *Time*, *Fortune*, *Sports Illustrated*, *People*, *Money*, and *Entertainment Weekly*.

The Washington Post is a leading newspaper with a nationwide daily circulation of over 778,000 and a Sunday circulation of over 1.05 million. It is published by a subsidiary of The Washington Post Company.